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CITATIONS

757027—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 220

MEYER WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 112–125) is reported at 65 F. Supp. 566. The opinion of the circuit court of appeals (R. 133–135) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered June 23, 1947 (R. 136). The petition for a writ of certiorari was filed July 21, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the finding that petitioner knowingly violated a selective service regulation by refraining from advising his draft board that he was no longer engaged in war production work, on the basis of which he had obtained a class II–B deferment.

2. Whether petitioner was justified in failing so to advise his draft board on the ground that, due to a liberalized selective service policy in regard to occupational deferments, he might not have been drafted in any event.

STATUTE AND REGULATIONS INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 894 (50 U. S. C. App. 311), provides in pertinent part:

> * * * any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

The applicable Selective Service Regulations provided as follows during the period involved in this case (June 3, 1944 to December 31, 1944):

§ 622.21. *Class II–A: Man supporting the national health, safety, or interest.* * * *

* * * * *

(c) In Class II–A shall be placed any registrant age 30 through age 37 or age 38 through 44 who is found to be "regularly engaged in" an activity in support of the national health, safety, or interest. (9 F. R. 5200.)[1]

§ 622.22. *Class II–B: Man in war production.* * * *

* * * * *

(c) In Class II–B shall be placed any registrant age 30 through 37 or age 38 through 44 who is found to be "regularly engaged" in an activity in war production. (9 F. R. 5201.)[2]

§ 622.23. *General rules for classification in Class II–A and Class II–B.*—(a) On the local board is placed the primary responsibility of deciding which men should be given occupational deferments. (8 F. R. 11346.)

* * * * *

§ 626.1 *Classification not permanent.*—(a) No classification is permanent. * * *

(b) Each classified registrant shall, within 10 days after it occurs, * * * re-

[1] The words "or age 38 through 44" were eliminated by an amendment of October 4, 1944 (9 F. R. 12199). The amendment has no relevance in this case.

[2] The words "or age 38 through 44" were eliminated by an amendment of October 4, 1944 (9 F. R. 12199). The amendment has no relevance in this case.

port to the local board in writing any fact that might result in such registrant being placed in a different classification. (6 F. R. 6844.)

STATEMENT

Count 2 of a two-count indictment filed July 26, 1945 (R. 3), in the District Court for the Eastern District of New York charged petitioner and others with having knowingly refrained from disclosing to petitioner's local draft board facts in respect of his liability for selective service, to wit, that from June 3, 1944, to December 31, 1944, petitioner was not employed by the Universal Camera Corporation and that his employment had terminated on or about June 3, 1944, in violation of Section 11 of the Selective Training and Service Act of 1940 and Selective Service Regulation 626.1 (b), *supra* (R. 5–6).[3] Petitioner waived a jury trial (R. 11–12) and was found guilty by a judge (R. 2, 125). He was sentenced to imprisonment for one year (R. 2, 46). On appeal, the judgment of conviction was affirmed (R. 136).

The case was submitted on a stipulation of facts (R. 17–32) and exhibits (R. 24, 26, 30, 31,

[3] Count 1, charging the same defendants with conspiracy to commit the substantive offense charged in count 2 (R. 4–5), was dismissed as to all the defendants on motion of the Government (R. 8, 11). Also on motion of the Government, count 2 was dismissed as to all the defendants except petitioner (R. 47).

44, 48–110). The facts may be summarized as follows:

Petitioner, an attorney (R. 18), was classified in class III–A by his local board on March 24, 1941 (R. 19). On September 4, 1943, he was advised by the board that his occupation (counsel to and assistant purchasing agent for Transogram Company, a toy manufacturing concern (see R. 56)) was non-deferable and that he would have to transfer to some other type of employment or be reclassified to class I–A for induction (R. 19–20). On September 10, 1943, petitioner applied for employment as "night supervisor" at the Universal Camera Corporation (hereafter referred to as "Universal"), and on September 13, 1943, he began to work there (R. 20). On September 14, 1943, Universal notified the local board that petitioner was employed by it and that it was "doing critical war work for the Army and Navy" (R. 20–21). On September 18, 1943, the local board notified petitioner that it had "read and considered the letter from the Universal Camera Corporation and in view of same, continues you in classification 3A" (R. 21).

On November 8, 1943, Universal sent to the local board a "42A" form on behalf of petitioner, and stated that it had "been authorized by Selective Service Headquarters to add his name to our replacement schedule" (R. 21). The 42A form stated that petitioner was "supervisor of the sealing division of the binocular assembly department

on the 3:30 P. M. to 12 midnight shift," and that it would take "over six months" to replace him (R. 21–22). An instruction on this form stated that the form was "to be filled out by an employer or other person who has knowledge of the registrant's eligibility for Class II deferment as a necessary man in his civilian occupation or activity" (R. 77).

On February 4, 1944, petitioner sent to the local board a supplemental affidavit stating that he was employed by Universal at 87½ cents per hour; that Universal did "100% war work;" that he was still attorney for Transogram Company, receiving a bi-weekly salary of $155 plus additional legal fees paid on a contingent basis; that he was part owner of Playwood Plastics Company, a subsidiary of Transogram, from which he received $200 per month; but that he was "required to devote little time to these companies and devotes a full time week to his work in Universal Camera Co." (R. 79).

On February 22, 1944, Universal sent another 42A form to the local board on behalf of petitioner, and advised the board that another replacement schedule had been approved (R. 22–23, 81).

On March 4, 1944, the local board reclassified petitioner to class I–A (R. 62), and on March 30, 1944, petitioner was so advised (R. 23, 62). On April 4, 1944, petitioner asked the board for a hearing in respect of his reclassification (R. 23, 86), and on April 5, 1944, the board advised him

that "You will have a hearing after you pass your physical examination" (R. 23, 87). However, he was not notified to appear for any hearing or physical examination (R. 23).

On May 22, 1944, Universal sent to the local board on behalf of petitioner a "42B" form, which was similar in nature and purpose to the earlier 42A forms (R. 23, 88). This form advised the board that Universal was "doing 100% critical war work for the U. S. Navy," and that petitioner was employed full time (R. 88, 89).

On June 3, 1944, petitioner ceased working at Universal, received no further pay, and never returned there to work (R. 17, 23, 26, 33). A Universal "notice of termination of service" slip, dated September 28, 1944, was filed in the company's files. It stated that petitioner was on "leave of absence. Ill health. Drs. note on file." (R. 92.)

On July 5, 1944, the local board reclassified petitioner to class II–B, and on July 8, 1944, notified him to that effect (R. 25, 41, 62). The notification card contained the usual admonition, "The law requires you: (1) To keep in touch with your local board; * * * (3) to notify it of any fact which might change your classification; * * *" (R. 31, 110).

On December 20, 1944, petitioner was questioned at New York City Selective Service Headquarters for the purpose of determining why he had not notified his local board that he had ceased

working at Universal (R. 27–28, 94–97). Petitioner explained that the reason he had not done so was "because I left with the assumption I was going to be called back. I wasn't fired, and I didn't quit. The production manager told me he didn't know whether I could have a leave for a week or two or a month. * * * I requested a leave of absence. The work on the night shift was petering out at the time. * * * I wasn't feeling well. * * * I went to a doctor and had myself checked. I have had bleeding from the rectum. My stomach wasn't feeling too well. * * *." He further stated that he had submitted a doctor's certificate to Universal. (R. 96.)

On December 26, 1944, petitioner wrote to his local board that "I had been on sick leave from Universal Camera Corp. * * *. Since I have been able to assume work again, the night shift had been dropped as the Navy binocular program had been completed. I was advised by Universal that I would be recalled to work as soon as the new Army program was started on the night shift * * *. I have again checked with the company and they are unable to give me definite information as to the date when I will be recalled. I have been advised to supply my draft board with the above information although my services have not been terminated by Universal Camera Corp." (R. 25–26, 91).

On February 2, 1945, petitioner was interviewed by agents of the Federal Bureau of Investigation (R. 29). He signed a statement reading, in part, as follows:

> * * * My second classification of 1A was dated in March, 1944. I wrote my board that I wished to appeal this classification * * * because at that time I was employed by the Universal Camera Corp., New York which was engaged 100% in National Defense work. I was notified by my board thru a new classification card that I was in 2B classification. This is the last classification I received. I did not personally appeal my 1A classification before the draft board but I assumed that the company had filed a deferment for me. When I received my 1A card, I showed it to the personnel office and they made a note of it * * *. (R. 99.)

Petitioner further stated to the F. B. I. agents that up to January 1, 1944, he worked his full shift, but that thereafter, because his work began to slacken, he checked himself out around 10:30 p. m. (R. 100).

Throughout the period during which petitioner was working for Universal on the night shift, he continued to work for the Transogram Company, and he also continued this work after he stopped working at Universal (R. 27).

ARGUMENT

1. Petitioner contends that the stipulated and undisputed evidence was insufficient to show that he knowingly violated the selective service regulation in question by failing to report his changed employment status to his local board (Pet. 4, 5, 17–26). We submit, however, that the evidence was ample to justify the trial judge's inference (R. 123) that petitioner's failure to report was knowing and wilful. Petitioner certainly was well aware that his II–B classification was due solely to the fact that he was engaged in "100% war work" for Universal (see pp. 6–9, *supra*). Nevertheless, for more than six months after he physically ceased to work at Universal, he failed to report that fact to his board, and finally advised his board of the facts only after he had been called to Selective Service Headquarters for questioning concerning his status. Under those circumstances, we think it immaterial whether his cessation of work is denominated a "leave of absence" or "termination of employment."[4] Petitioner was, as noted by the circuit court of appeals, "a lawyer who had some familiarity with the duties of registrants as well as a registrant to whom a card had been given on which he was ad-

[4] For this reason we think petitioner's challenge of his conviction on the ground that the indictment alleged the unreported fact to be a termination of employment, whereas the evidence disclosed a mere leave of absence (Pet. 4, 27–31), is likewise baseless.

monished '(3) to notify it (the local board) of any fact which might change your classification' " (R. 135). Certainly, to any man of intelligence who knew his II–B classification was due to his being engaged in war work, it should have been clear that he was under an obligation to advise his board when his engagement in such work in fact ceased. As the circuit court of appeals further remarked, "Though failure to report a short leave of absence could well have been due to his belief that he would soon be at work again, that excuse could hardly within reason continue as month succeeded month without the occurrence of anything, so far as the record shows, to justify him in retaining that belief. On the contrary it was an amply justified inference that his failure to report that he was not at work was due to his desire to have that fact remain undisclosed to his local board so long as possible in order to prevent or delay his reclassification into a non-deferred class" (R. 135).[5]

2. Petitioner also contends that "Not only did [he] not knowingly fail and neglect to advise his Local Board of a fact that might result in his being placed in a different classification, but no such fact existed" (Pet. 32). He urges that "his classification would not have been * * * affected one way or the other" by his disclosure to

[5] See also the observations of the trial judge disclosing the grounds on which he inferred scienter on the part of petitioner (R. 123–125).

his board of the fact that he was no longer doing war work for Universal (*ibid.*). In support of this contention, he cites various Bulletins issued by the New York City Selective Service Headquarters to local boards, from May to November 1944, indicating that "the Army and the Navy do not want men over 26 years of age for the time being" (Pet. 33); that men between 30 and 37 years of age[6] "should be granted occupational deferments if they are 'regularly engaged' in activities in support of the national health, safety or interest" (Pet. 34); that it was not required that men in this age group be "necessary men," the importance or lack of importance of their jobs being immaterial (*ibid.*), etc. (see Pet. 33–39). Petitioner's contention is without merit.

In the first place, notwithstanding the liberalized policy of Selective Service Headquarters in regard to occupational deferments, there was throughout the period from June 3 to December 31, 1944, a clear-cut distinction between classes II–A and II–B (see p. 3, *supra*). Class II–B, the higher-ranking occupational deferment classification, was reserved for men regularly engaged in an activity in war production. Class II–A was a lower-ranking classification, being for men regularly engaged in an activity in support of the national health, safety, or interest. Petitioner had every reason to believe, therefore, that if his

[6] Petitioner was 35 years old when he discontinued working for Universal on June 3, 1944 (see R. 18).

local board had been aware that he was no longer "regularly engaged in" an activity in "war production" (as he certainly was not after June 3, 1944), it would not continue him in Class II–B. The most that he had a right to expect, even under the liberalized occupational deferment policy, was that he would be placed in Class II–A. This would be on the assumption (and we may so assume, *arguendo*) that his occupation as counsel to and assistant purchasing agent for a toy manufacturing concern, the only occupation in which he was "regularly engaged" after June 3, 1944, would be deemed by the board to be an occupation in an activity "in support of the national health, safety, or interest." Consequently, since regulation 626.1 (b) required petitioner to report "any fact that might result in [his] being placed in a different classification" (and his notification card advising him of his II–B classification also warned him of this duty), he was required to report his cessation of war production work notwithstanding that he might continue to be deferred on another basis.

Secondly, petitioner manifestly had no right to assume that his local board would retain him in any deferred classification if it became aware that his work in war production had ceased. He had no right to substitute his own discretion for that of his local board in this respect. The exercise of judgment as to the classification of a registrant has always been exclusively that of the local

boards, subject, of course, to the registrant's right of appeal. *Falbo* v. *United States,* 320 U. S. 549, 552; and see regulation 622.23 (a), *supra,* p. 3. Indeed, New York City Selective Service Headquarters Bulletin No. 118, dated June 9, 1944, specifically provided that—

> Notwithstanding the liberalized policies regarding occupational classification, it still remains the duty and responsibility of registrants and employers to notify Local Boards in *writing* of any facts which might affect a registrant's classification. (Section 626.1 of the Regulations.) All terminations and changes of employment must be reported promptly. [Italics in the original.]

Furthermore, no one could foresee when an emergency, or an immediate call for men, would necessitate a quick review by the local boards of their files. On any such new call for men the local boards were entitled to have every pertinent fact available to make instant decisions. They were entitled to have a full and true record on every registrant.[7]

Finally, there was no evidence that petitioner knew of the contents or the existence of the bulle-

[7] Just such an emergency in fact arose in December 1944. Bulletin No. 129, dated December 11, 1944, contained a telegram from National Selective Service Headquarters stating as follows:

"There is continuing urgent need for combat replacements in the European and Pacific theatres of war and a most critical shortage of workers in war activities.

"It is increasingly necessary that all persons, and particu-

tins he now relies on. They were not relevant, therefore, to his intent or state of mind during the period when he allegedly failed to report his changed occupational status.[8]

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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AUGUST 1947.

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larly registrants eighteen through thirty-seven, participate to the full extent of their ability either in the Armed Forces or in the civilian war effort.

* * * * *

"Selective Service Regulations and Memoranda are being amended to provide that when an occupationally deferred registrant leaves the employment for which he has been deferred, he shall be reclassified into a class immediately available for service * * *."

[8] Petitioner also contends that the terms of Selective Service Regulation 626.1 (b) are too vague and indefinite to support a criminal prosecution and conviction for knowingly failing to comply with it (Pet. 4–5, 41–48). The contention is without merit. *Stassi* v. *United States*, 152 F. 2d 581, 582 (C. C. A. 5), certiorari denied, 328 U. S. 842; see also our briefs in opposition to certiorari in the *Stassi* case (No. 971, O. T. 1945, pp. 7–10), and in *Perniciaro* v. *United States*, No. 1085, O. T. 1946, pp. 8–9, certiorari denied April 14, 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947